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No. 93-972

In the Supreme Court of the United States

OCTOBER TERM, 1993

ELADIO T. FIGUEROA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PAUL M. HONIGBERG
RICHARD MONTAGUE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

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QUESTIONS PRESENTED

1. Whether the Federal Employees' Compensation Act (FECA) requires a court to dismiss a suit brought by injured federal employees against the United States under the Federal Tort Claims Act when there is a substantial question whether the employees' injuries are covered under FECA.

2. Whether a substantial question of FECA coverage exists as to petitioners' allegations that they sustained physical injuries, increased risk of future physical injuries, and emotional distress, due to their exposure to toxic substances in the workplace.

3. Whether FECA contains an exception to its exclusive remedy provisions for intentionally inflicted injuries.

4. Whether the individual respondents—12 officers and employees of the United States Navy who supervised the cleanup and continued operation of an electrical power plant following a 1987 accident in which toxic substances were released—are entitled to qualified immunity in a *Bivens* suit brought by plant employees and their families alleging that their exposure to toxic substances violated the substantive component of the Fifth Amendment's Due Process Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A39) is reported at 7 F.3d 1405. The opinions of the district court (Pet. App. A40-A54, A55-A97, A98-A133, A134-A159) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 1993. The petition for a writ of certiorari was filed on December 16, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The United States Navy operates an electrical power generating station in Guam. In 1987, a transformer junction box at the station released oil containing polychlorinated biphenyls (PCBs), a toxic substance. Petitioners are 251 persons employed by the federal government at the time of the accident and almost 1,000 of their relatives, all of whom allege that they were exposed to the PCBs. In 1991, petitioners filed this action in federal court against the United States and 12 individual officers and employees of the Navy. Petitioners asserted that their alleged exposure to PCBs caused personal injuries, increased risk of future illnesses and injuries, and emotional distress. Jurisdiction over the claims against the United States was asserted under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680. The claims against the 12 individual defendants were brought under *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). Pet. App. A6-A8, A98-A100, A135.

2. a. The United States moved to dismiss petitioners' FTCA claims on the ground that the claims were barred by the Federal Employees' Compensation Act (FECA), 5 U.S.C. 8101-8193. The district court granted the motion. Pet. App. A131.

The district court began its analysis with the observation that FECA provides the exclusive remedy for federal employees injured during the performance of their duties and bars all other tort actions against the United States to recover damages for job-related injury or death. Pet. App. A102-A103; see 5 U.S.C. 8116(c). The court further noted that the Secretary of Labor is vested with unreviewable authority to determine whether an injury or illness is covered by FECA. Pet. App. A104-

A105; see 5 U.S.C. 8128(b). Finally, the court recognized that when a federal employee's FTCA suit raises a "substantial question" of FECA coverage, the court must dismiss the action to allow the Secretary of Labor to rule on the employee's FECA claims. Pet. App. A105; see *Reep* v. *United States*, 557 F.2d 204, 207 (9th Cir. 1977).

Applying these principles, the district court ruled that a substantial question of FECA coverage was present in this case and that petitioners' FTCA claims must therefore be dismissed, for three reasons: "First, and most importantly, the federal employee plaintiffs' injuries, both present and future, are clearly job-related." Pet. App. 107. "Second, some emotional injuries, even absent physical harm, are covered by FECA." *Ibid.* "Third, [petitioners] cannot split their claims and seek to place their claims for future physical injury or increased risk of future physical injury outside the scope of FECA coverage simply because the physical injury has not yet manifested itself and is unlikely to do so until well after the three-year period for presenting FECA claims expires." *Id.* at A108-A109. FECA "specifies that the three-year period does not begin to run until the employee becomes aware or should have become aware that his disability is job-related." *Id.* at A109; see 5 U.S.C. 8122(b).

b. The 12 individual respondents moved to dismiss petitioners' *Bivens* claims on grounds of qualified immunity. The district court, however, denied both that motion (Pet. App. A152-A159) and a subsequent motion for reconsideration (*id.* at A67-A84). Rejecting the argument that petitioners had not alleged a violation of a clearly established constitutional right, the court concluded that "[c]ase law existed at [the time of the 1987 accident] finding violation[s] of substantive due process

rights where government officials deliberately placed individuals in a position of known danger." *Id.* at A78. In the court's view, "[e]xposure to toxic materials from the explosion was a known danger." *Id.* at A157-A158.

3. The court of appeals affirmed the district court's dismissal of petitioners' FTCA claims against the United States but reversed the district court's judgment that the individual respondents were not entitled to qualified immunity. Pet. App. A37.

a. On the question whether FECA barred petitioners' FTCA claims, the court of appeals noted that the "general rule [is] that when a claim arguably falls under FECA, the question of coverage should be resolved by the Secretary." Pet. App. A12 (citing *Reep*, 557 F.2d at 207).[1] Applying that rule, the court held that petitioners' claims—including their claims of mental distress—"are colorably under FECA." Pet. App. A12. In this connection, the court first observed that "[petitioners'] alleged mental distress injuries are tied to physical harm, both potential and actual. As a result of their exposure to the PCBs, and after suffering some medical problems, [petitioners] are concerned about developing cancer."

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[1] The court of appeals rejected petitioners' argument that, under *Sheehan* v. *United States*, 896 F.2d 1168, modified, 917 F.2d 424 (9th Cir. 1990), the district court should have decided whether their claims were covered by FECA. The *Sheehan* court had stated that, when there is a question as to FECA's "scope of coverage" a court should resolve the question. In the court of appeals' view, however, "*Sheehan* stands only for the proposition that when a plaintiff has failed to allege a colorable claim under FECA as a matter of law, the district court should render a judgment. We do not read *Sheehan* as altering the general rule that when a claim arguably falls under FECA, the question of coverage should be resolved by the Secretary." Pet. App. A11-A12.

Ibid. Such claims are arguably covered by FECA, the court reasoned, because FECA

> contemplates coverage for a condition produced over a long period of time by "stress" or as a result of being exposed to a "toxic" substance that may cause future harm. Arguably, mental distress is a form of stress. It takes only a small step to conclude that FECA also contemplates coverage for a condition of emotional distress that *results* from the stress of being exposed in a *discrete* event to a toxic substance that could cause future physical harm.

Id. at A13 (quoting 20 C.F.R. 10.15(a)(16); emphasis in original). The court also relied upon the Department of Labor's determination that emotional distress may be compensable under FECA under some circumstances. Pet. App. A13-A14.

b. The court of appeals reversed the district court's denial of the individual respondents' motion to dismiss on qualified immunity grounds. After surveying the law, the court rejected the district court's conclusion that "in 1987 it was clearly established that a government employer's order to an employee to perform a dangerous task, without informing the employee about the potential harm of which the employee was ignorant, constituted a deprivation of liberty for purposes of the due process clause." Pet. App. A35 (citing *Walker* v. *Rowe*, 791 F.2d 507 (7th Cir.), cert. denied, 479 U.S. 994 (1986); and *McClary* v. *O'Hare*, 786 F.2d 83 (2d Cir. 1986)). In the court of appeals' view, "the district court failed to consider that in 1987 a right not to be placed in danger by a government actor was contingent upon that actor first depriving an individual of his liberty." Pet. App. A18.

ARGUMENT

1. a. Petitioners' principal submission (Pet. 22-27) is that the court of appeals erred by holding that substantial questions of FECA coverage should be referred to the Secretary of Labor. In their view, federal courts are obligated to determine whether FECA covers an injured worker's claim and allow him to proceed under the FTCA if it does not. Petitioners' view is contrary to the language and structure of FECA, the statements of this Court, and the unanimous conclusion of the courts of appeals. Further review is therefore unwarranted.

FECA is an employee's exclusive remedy for any injury covered by the Act and supplants all other liability on the part of the government to the injured employee under the FTCA or any other tort liability statute. See 5 U.S.C. 8116(c); *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 193-194 (1983); *Johansen* v. *United States*, 343 U.S. 427, 440-441 (1952). The Secretary of Labor has been empowered to "decide all questions arising under" FECA and his decisions are "final and conclusive" and "not subject to review" by any court. 5 U.S.C. 8145, 8128(b). In *Southwest Marine, Inc.* v. *Gizoni*, 112 S. Ct. 486 (1991), this Court observed that "FECA contains an 'unambiguous and comprehensive' provision barring any judicial review of the Secretary's determination of FECA coverage. Consequently, the courts have no jurisdiction over FTCA claims where the Secretary of Labor determines that FECA applies." *Id.* at 493 (citing 5 U.S.C. 8128(b); quoting *Lindahl* v. *OPM*, 470 U.S. 768, 780 & n.13 (1985)). Consistent with that reading of FECA, every circuit to have considered the issue has held that FECA requires federal courts to dismiss or stay an FTCA action brought by an injured federal employee raising a substantial question of FECA

coverage.[2] Reflected in this rule is the fact that FECA's remedies are exclusive, that the Secretary has unreviewable authority to determine when FECA applies, and that federal courts have no jurisdiction over a claim arising under FECA.[3]

There is no circuit conflict over the "substantial question" rule, as petitioners contend (Pet. 23-26). The only case cited by petitioners for the proposition that federal courts should decide questions of FECA coverage instead of referring them to the Secretary of Labor is *Sheehan* v. *United States*, 896 F.2d 1168, modified, 917 F.2d 424 (9th Cir. 1990). Because the decision below and *Sheehan* are both Ninth Circuit decisions, petitioners have at most alleged an intra-circuit conflict that does not warrant review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

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[2] See, *e.g.*, *McDaniel* v. *United States*, 970 F.2d 194, 198 (6th Cir. 1992) (per curiam); *Bruni* v. *United States*, 964 F.2d 76, 78-79 (1st Cir. 1992); *Griffin* v. *United States*, 703 F.2d 321, 322 (8th Cir. 1983); *DiPippa* v. *United States*, 687 F.2d 14, 16 (3d Cir. 1982); *Wallace* v. *United States*, 669 F.2d 947, 951-952 (4th Cir. 1982); *Reep* v. *United States*, 557 F.2d 204, 207 (9th Cir. 1977); *Bailey* v. *United States*, 451 F.2d 963, 965 (5th Cir. 1971); see also *Daniels-Lumley* v. *United States*, 306 F.2d 769, 770-771 (D.C. Cir. 1962). A substantial question of coverage exists "unless it is *certain* that the Secretary would not find coverage." *Bruni*, 964 F.2d at 79.

[3] Petitioners claim that FECA does not bar their FTCA suit because they "have never submitted a claim under FECA, and this is not an action seeking a review of such a claim." Pet. 23. Petitioners, however, cannot circumvent the exclusivity of FECA's remedy simply by failing to file FECA claims. Rather, they "must first seek and be denied relief under FECA unless [their] injuries do not present any substantial question of compensability under that act." *Avasthi* v. *United States*, 608 F.2d 1059, 1060 (5th Cir. 1979).

In *Sheehan* a federal employee was subjected to sexual harassment and slander by her supervisor and subsequently brought an FTCA suit against the United States alleging intentional and negligent infliction of emotional distress. Concluding that there was a substantial question whether FECA covers non-physical injuries such as emotional distress, the district court stayed the proceedings and referred the question to the Secretary of Labor. The Secretary concluded that FECA covers such claims, but denied compensation because Sheehan's injury was not causally related to her employment. The district court therefore dismissed the FTCA action. The Ninth Circuit reversed, stating that federal courts should decide questions of FECA's "scope of coverage." The Ninth Circuit then reinstated Sheehan's FTCA suit on the ground that "FECA compensates government employees only for physical harm. Sheehan's alleged injury—emotional distress—is divorced from any claim of physical harm." 896 F.2d at 1174.[4]

In this case, it was the court of appeals' view that *Sheehan* is not in conflict with the "substantial question" rule. The court observed that in *Sheehan* "the plaintiff's claim was not colorable under FECA as a matter of law" and as a consequence concluded that "*Sheehan* stands only for the proposition that when a plaintiff has failed to allege a colorable claim under FECA as a matter of law, the district court should render a judgment." Pet. App. A11-A12. The Ninth Circuit has thus construed *Sheehan* in harmony with the substantial question rule: "We do not read *Sheehan* as altering the general rule that when a claim arguably falls un-

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[4] The government has taken the position that *Sheehan* was wrongly decided. See Gov't C.A. Br. at 22 n.14, 36; cf. *id.* at 21.

der FECA, the question of coverage should be resolved by the Secretary." Pet. App. A12 (citing *Reep* v. *United States*, 557 F.2d 204, 207 (9th Cir. 1977)).

The court of appeals ruled that petitioners' claims "are colorably under FECA" (Pet. App. A12) and the district court similarly ruled that petitioners' claims raise "a substantial question of FECA coverage" (*id.* at A106). Accordingly, the courts below properly dismissed petitioners' FTCA claims.

b. Petitioners also claim (Pet. 27-29) that there is a circuit split on the question whether FECA provides compensation for emotional distress and suggest that this Court grant review to resolve the matter. Further review is unwarranted, however, because there is no question but that emotional distress such as petitioners have alleged is covered by FECA.

The Secretary of Labor has concluded that under certain circumstances emotional distress is compensable under FECA. See, *e.g.*, *In re Lillian Cutler*, 28 Empl. Comp. App. Bd. 125, 129-131 (1976); see also Pet. App. A13 ("the Department of Labor has determined that emotional distress may be considered a disability") (citing *Lillian Cutler*). The Secretary "has the final say as to the scope of FECA" and his "position on th[e] issue is not subject to doubt." *McDaniel* v. *United States*, 970 F.2d 194, 196, 197 (6th Cir. 1992) (per curiam); see 5 U.S.C. 8128(b)(2). Consistent with the Secretary's authoritative view, the law in every circuit that has considered the question is that emotional distress falls within the ambit of FECA. See Pet. App. A13; *Swafford* v. *United States*, 998 F.2d 837, 840-841 & n.1 (10th Cir. 1993); *McDaniel*, 970 F.2d at 196-197; *Bruni* v. *United States*, 964 F.2d 76, 78 (1st Cir. 1992); *Jones* v. *TVA*, 948

F.2d 258, 265 (6th Cir. 1991).[5] Accord *Castro* v. *United States*, 757 F. Supp. 1149, 1150-1151 (W.D. Wash. 1991); *Burke* v. *United States*, 644 F. Supp. 566, 568-569 (E.D. La. 1986); *Williams* v. *United States*, 565 F. Supp. 59, 61 (N.D. Miss. 1983).

Contrary to petitioners' assertion, there is no conflict as to whether emotional distress such as petitioners have alleged is covered by FECA. In each of the cases that petitioners cite, the emotional distress was unrelated to any claim of physical harm.[6] For example, in

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[5] The three circuit court decisions cited by petitioners—*Sheehan*, *supra*; *Guidry* v. *Durkin*, 834 F.2d 1465 (9th Cir. 1987); and *DeFord* v. *Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983)—do not indicate a circuit split. *DeFord* stated that FECA does not appear to cover claims such as discrimination, mental distress, or loss of employment. 700 F.2d at 290. Subsequently, however, the Sixth Circuit characterized *DeFord*'s statement about mental distress as dictum and held that FECA does cover claims of emotional distress. See *McDaniel*, 970 F.2d at 196-197. *Sheehan* and *Guidry*—both of which are Ninth Circuit decisions—are superseded by the Ninth Circuit's conclusion in the instant case that "emotional distress may be considered a disability" in some circumstances. Pet. App. A13. Therefore, the most recent pronouncements by the Sixth and Ninth Circuits align with the views of the other circuits that have addressed the question at issue.

[6] See *Sheehan*, *supra* (sexual harassment); *Guidry*, *supra* (defamation); *DeFord*, *supra* (discrimination in retaliation for whistleblowing); *Underwood* v. *United States Postal Service*, 742 F. Supp. 968 (M.D. Tenn. 1990) (verbal harassment); *Newman* v. *Legal Services Corp.*, 628 F. Supp. 535 (D.D.C. 1986) (prevention of communication with co-workers); *Lawrence* v. *United States*, 631 F. Supp. 631 (E.D. Pa. 1982) (retaliation for exercise of First Amendment rights); *Mason* v. *District of Columbia*, 395 A.2d 399 (D.C. 1978) (unlawful arrest and false imprisonment). See also *Metz* v. *United States*, 723 F. Supp. 1133, 1136 (D. Md. 1989) (holding that emotional distress arising from exposure to the anthrax bacteria is covered under FECA and distinguishing a number of the above cases on the ground that the emotional

petitioners' leading case, *Sheehan*, the employee alleged that sexual harassment and slander committed by her supervisor constituted intentional and negligent infliction of emotional distress and the Ninth Circuit held that her FTCA suit was not barred by FECA because her "alleged injury—emotional distress—is divorced from any claim of physical harm." 896 F.2d at 1174. But here petitioners' alleged emotional distress is a consequence of their accidental exposure to toxic substances. As the court of appeals noted, petitioners' "alleged mental distress injuries *are tied to physical harm*, both potential and actual." Pet. App. A12 (emphasis added). In sum, although there is some non-circuit court authority for the proposition that emotional distress *unconnected* to any physical harm is not covered by FECA,[7] none of the authorities that petitioners cite holds that emotional distress of the sort that petitioners have alleged falls outside of the scope of FECA.

In any event, even if compensation is unavailable under FECA for petitioners' emotional distress, petitioners' FTCA suit would still be barred. In addition to their allegations of mental distress, petitioners allege that they have suffered actual physical harm arising from the same incident. Pet. App. A12. Because FECA concededly encompasses the physical injury claims, FECA is petitioners' exclusive remedy and bars an FTCA suit.

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distress in those cases did not involve "*personal injury* caused by accident or by disease.").

[7] The Secretary has not limited FECA recovery to claims of emotional distress accompanied by physical harm. See, *e.g.*, *McDaniel*, 970 F.2d at 197 ("[T]he Secretary has taken the view that McDaniel's claim [of emotional distress resulting from harassment] is cognizable under FECA."); *Swafford*, 998 F.2d at 840 n.1 ("[T]he Secretary has taken the position that emotional distress falls within the coverage of FECA.").

See 5 U.S.C. 8116(c); *Green* v. *Hill*, 954 F.2d 694, 697 n.9, modified, 968 F.2d 1098 (11th Cir. 1992) (per curiam);[8] *Griffin* v. *United States*, 703 F.2d 321, 322 (8th Cir. 1983) (per curiam); *Metz* v. *United States*, 723 F. Supp. 1133, 1137 (D. Md. 1989). See also *Benton* v. *United States*, 960 F.2d 19, 21 (5th Cir. 1992); *Posegate* v. *United States*, 288 F.2d 11, 14 (9th Cir.), cert. denied, 368 U.S. 832 (1961).

c. Petitioners also invite this Court to carve out an exception to FECA's exclusive remedy provision for intentional torts (Pet. 29-31). FECA, however, provides no warrant for such an exception. FECA is an employee's exclusive remedy for "injury or death," 5 U.S.C. 8116(c); it makes no exception for injuries that are intentionally inflicted.[9] Consistent with FECA's plain language, courts have uniformly held that "FECA covers liability created both by negligent *and intentional* acts on the part of the Government." *Green* v. *Hill*, 954 F.2d at 697 (emphasis added). Accord *Heilman* v. *United States*, 731 F.2d 1104, 1111 n.6 (3d Cir. 1984); *Metz*, 723 F. Supp. at 1135-1137; *Burke*, 644 F. Supp. at 569. Petitioners cite no authority to the contrary.

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[8] In *Green* v. *Hill*, the Eleventh Circuit noted that "[c]ourts are split on the issue of whether the FECA provides recovery for emotional damages" but concluded that "Green's claims for emotional injury are nevertheless precluded because they arise from the claims of physical assault and battery, and the FECA provides exclusive recovery for the same incident." 954 F.2d at 697 n.9. The same conclusion applies in this case.

[9] FECA does exempt from compensation those injuries caused by (1) the injured employee's own willful misconduct, (2) his intent to injure himself, or (3) the employee's intoxication. See 8 U.S.C. 8102(a)(1)-(3). Section 8102(a) establishes no similar exception for injuries intentionally inflicted upon a worker by a government agent.

Petitioners maintain that FECA ought to be construed to exempt intentionally inflicted injuries because of the intentional tort exceptions that exist in the workers' compensation laws of Guam and various states. That analogy is inapt, however, because federal law, not state law, governs issues of coverage and exclusivity under FECA. See *Glover* v. *Johns-Manville Corp.*, 525 F. Supp. 894, 899 (E.D. Va. 1979), aff'd, 662 F.2d 225 (4th Cir. 1981).[10]

2. Petitioners also challenge (Pet. 31-32) the court of appeals' conclusion that the individual respondents were entitled to qualified immunity. In their view, that ruling conflicts with this Court's decision in *Collins* v. *City of Harker Heights*, 112 S. Ct. 1061 (1992); they do not otherwise contest the propriety of the court of appeals' holding. Further review of this matter is unwarranted, however, as there is no arguable conflict between the decision below and *Collins*.

The alleged conflict stems entirely from petitioners' misunderstanding of the court of appeals' decision. Petitioners claim that the court of appeals based its ruling upon the fact that petitioners are federal employees. See Pet. 32-33. The court's decision, however, was based upon an entirely different consideration. In the courts below, petitioners asserted that they had a "general liberty interest not to be placed in a position of danger by government actors." Pet. App. A17. The court of appeals held that, as of 1987, there was no such clearly established right "absent some sort of governmental restriction on an individual's physical freedom to act to avert potential harm." *Id.* at A36. Thus, respondents were

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[10] In any event, an intentional tort exception to FECA would not benefit petitioners because any injuries that they may have suffered clearly were not intentionally inflicted.

entitled to qualified immunity, not because petitioners were federal employees, but because petitioners had not alleged an impairment of their physical liberty. Nothing in the court's opinion suggests that, had petitioners not been federal employees, a different result would have obtained.[11] Quite to the contrary, the court in several places refers in general terms to the liberty of a "person" or "individual." See *id.* at A35, A36.

Nothing in the decision below is inconsistent with *Collins*. In *Collins*, a municipal employee died of asphyxia after entering a manhole to unstop a sewer line. His widow brought suit under 42 U.S.C. 1983, alleging that the city had violated the substantive component of the Fourteenth Amendment's Due Process Clause "by failing to provide a reasonably safe work environment." 112 S. Ct. at 1069. Reasoning that the Due Process Clause does not "guarantee municipal employees a workplace that is free of unreasonable risks of harm," *id.* at 1070, this Court held that the widow had not alleged a constitutional violation. The decision below reaches a similar and entirely consistent conclusion about the state of the law in 1987. Compare *Collins*, 112 S. Ct. at 1069 ("Neither the text nor the history of the Due Process Clause supports petitioner's claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause.") with Pet. App. A35 ("[W]e cannot conclude that in 1987 it was clearly established that a government employer's order to an employee to perform a dangerous task, without informing the employee about the potential harm of which the employee

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[11] The impossibility of petitioners' reading of the court of appeals' opinion is underscored by the fact that nearly 1,000 of the petitioners are *not* federal employees. See Pet. App. A56, A99.

was ignorant, constituted a deprivation of liberty for purposes of the due process clause.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PAUL M. HONIGBERG
RICHARD MONTAGUE
Attorneys

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